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No. 155. OCTOBER TERM, 1906.

IN THE

Supreme Court of the United States.

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JAMES H. McKENNEY,
CLERK.

William J. Doyle and James G. Doak, Trading as Doyle & Doak, Plaintiffs in Error,

vs.

London Guarantee and Accident Company, Limited, Defendant in Error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

THOMAS RAEBURN WHITE,
For Defendant in Error.

Allen, Lane & Scott, Prs., Phila

IN THE SUPREME COURT OF THE UNITED STATES.

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BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

It is submitted that the Circuit Court of Appeals has not jurisdiction upon the writ of error to review the judgment recited in the certificate, because it was not a final judgment of the court below. In support of this position, the following subsidiary propositions are submitted:

FIRST.

The Circuit Courts of Appeals have jurisdiction to review the action of Circuit or District Courts by writ of error or appeal only after final judgment in the court below.

It is expressly provided in the statute establishing the Circuit Courts of Appeals, and will not be denied, that

writs of error to review the action of Circuit or District Courts can only be considered in the Circuit Courts of Appeals after final judgment in the court below. The Act of March 3d, 1891, ch. 526, 26 Stat. L., 828, provides:—

> "SEC. 6. That the Circuit Court of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law."

A final judgment or decree is one which leaves nothing further to be done in the case except execution of the judgment of the court.

Grant *vs.* Phœnix Life Ins. Co., 106 U. S., 429 (1882);

St. Louis, &c., Ry. Co. *vs.* Southern Express Co., 108 U. S., 24 (1883);

Robinson *vs.* Belt, 56 Fed. Rep., 328 (1893).

It matters not that the question sought to be reviewed involves an attack upon the jurisdiction of the lower court, an appeal or writ of error cannot be considered until after the final disposition of the case.

McLish *vs.* Roff, 141 U. S., 661 (1891).

SECOND.

The order of the Circuit Court which plaintiffs in error were adjudged to have disobeyed was not final.

On page 1 of the certificate is set forth the order entered by the Circuit Court of the United States for the Eastern District of Pennsylvania, commanding plaintiffs in error to produce certain books of original entry for the examination of defendant in error. This shows upon its face that it was an interlocutory order, entered in the

preliminary stages of the case to protect the defendant in error in a right claimed by it to inspect, before trial, the books of its opponent.

THIRD.

Contempt proceedings are of two classes, vindicatory and remedial.

The argument in this court must necessarily revolve about the question whether the order, adjudging the plaintiffs in error to be guilty of contempt, was final. As preliminary to the determination of this question, it is necessary to consider the nature of contempt proceedings. The inherent power of the courts to impose punishment for contempt is made use of for two purposes:—

1. To vindicate the authority of the court by punishing misbehavior in its presence, violation of its orders, &c.

2. To protect litigants by requiring their opponents to respect the rights which they are adjudged to possess, or to perform orders or decrees made for their benefit.

This dual purpose of instituting contempt proceedings has given rise to two well recognized classes of contempt cases. The first class consists of those undertaken sometimes on the court's own motion, for the purpose of punishing misbehavior in its presence, libels concerning its judicial action, disobedience of its orders, &c. The main feature of such proceedings is the vindication of the court's authority by the punishment of the offender. If they result beneficially to a suitor, it is only incidental. Such proceedings are usually termed "criminal contempts," and the action of the court in imposing the punishment is necessarily final. There is no way that the person convicted can purge himself of contempt save by paying his fine or suffering imprisonment.

The second class consists of those cases in which one party to litigation has disobeyed some order of the court,

made for the benefit of the other party. Such proceedings are instituted at the instance of the injured party, not primarily for the purpose of vindicating the authority of the court, or punishing the offender, but to reimburse the injured party for loss inflicted upon him or to compel obedience to an order made for his benefit. Proceedings of this nature are termed "civil contempts;" are held to be a part of the main suit between the parties, and are usually interlocutory in their nature. They are either mere executions, providing for the payment of money to the party injured; or, are cases in which the contemnor can purge himself of contempt and escape the threatened punishment by performing the order of the court.

In the case of

In re Chiles, 22 Wallace, 157, 168 (1874),

Mr. Justice Miller said:—

> "Section 725 of the Revised Statutes declares that the courts of the United States shall have power to punish by fine and imprisonment for contempts of their authority. And among the cases specially enumerated are 'disobedience or resistance by any officer of the court, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.' Such has always been the power of the courts both of common law and equity. The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.
>
> "In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

In

Bessette *vs.* W. B. Conkey Co., 194 U. S., 234 (1903),

this court fully recognized this distinction between civil and criminal cases. Mr. Justice Brewer quoted with approval the language of Judge Sanborn *in re* Nevitt, 54 C. C. A., 622 (117 Fed. Rep., 448), as follows:—

> "Proceedings for contempt are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the Government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.
> * * *
>
> "A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings. See also Rapalje on Contempts, Sec. 21."

FOURTH.

Vindicatory contempt proceedings are the only ones reviewable on writ of error by the Circuit Courts of Appeals prior to the termination of the main suit.

Vindicatory contempt proceedings, being criminal in their nature, are reviewable on writ of error by the Circuit Courts of Appeals, as a part of their criminal jurisdiction. It matters not whether the main suit between the parties is in equity or at law, or whether such suit has been terminated, because the imposition of punishment in vindicatory contempt proceedings is a final judgment in a criminal case.

Prior to the establishment of the United States Circuit Courts of Appeals there could be no review of vindicatory contempt proceedings. The Supreme Court had not jurisdiction in criminal cases (other than capital cases) save where the judges of the lower court were divided in opinion, and therefore, although upon *habeas corpus* proceedings they could, and sometimes did, consider the question as to whether a prisoner was held by authority of law, the right to review vindicatory contempt cases by writ of error, or on appeal, was universally denied.

Ex parte Kearney, 7 Wheat., 38 (1822);
New Orleans *vs.* Steamship Co., 20 Wall, 387 (1874);
Hayes *vs.* Fischer, 102 U. S., 121 (1880);
Bessette *vs.* W. B. Conkey Co., 194 U. S., 324 (1903).

The Circuit Courts of Appeals were given general appellate jurisdiction in criminal cases, and the question soon arose, whether, as a part of such criminal jurisdiction, vindicatory contempt proceedings could not be reviewed on writ of error. The law was in some confusion on this point, because of a doubt whether the declination of the Supreme Court of the United States to take jurisdiction of vindicatory contempt proceedings by writ of error or appeal was due only to its lack of criminal ju-

risdiction, or was rested upon the principle of the English cases that contempt proceedings are never reviewable by any court other than that in which they were originally conducted. The law on this point, however, was settled by the recent case of

Bessette *vs.* W. B. Conkey Co., 194 U. S., 324 (1903);

in which the whole subject of the jurisdiction of the appellate courts to review vindicatory contempt proceedings was carefully reviewed. It was pointed out that the reason the Supreme Court of the United States had never taken jurisdiction of such cases on writ of error or appeal was because they were criminal, and that court had no criminal jurisdiction. A question being certified by the Circuit Court of Appeals for the Seventh Circuit inquiring whether it had jurisdiction to review the judgment of the Circuit Court of the United States, finding a person not a party to the suit guilty of contempt, the question was answered in the affirmative. Vindicatory contempt proceedings being criminal cases, it was held that the final imposition of punishment in such cases could be reviewed on writ of error by the Circuit Courts of Appeals. The court, however, was careful to limit its decision to vindicatory contempt proceedings, having special reference to the imposition of punishment upon persons who were not parties to the suit. Toward the close of his opinion Mr. Justice Brewer said:—

> "So when, by Section 6 of the Courts of Appeals' Act, the Circuit Courts of Appeals are given jurisdiction to review the 'final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law,' and the preceding section gives to this court jurisdiction to review convictions in only capital or otherwise infamous crimes, and no other provision is found in the statutes for a review of the final order in contempt cases, upon what satisfactory ground can it be

held that the final decisions in contempt cases in the Circuit or District Courts are not subject to review by the Circuit Courts of Appeals? Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of opinion that there is a right of review in the Circuit Courts of Appeals."

It is contended by the plaintiffs in error that any imposition of punishment in a contempt proceeding is necessarily a final judgment in a criminal case, and, therefore, reviewable by writ of error whether vindicatory or remedial. This contention ignores the distinction between criminal and civil contempt proceedings and is not sustainable by authority.

It is a principle well settled that the court which has imposed punishment as a coercive measure in a civil suit can afterwards remit the punishment, which it would not have the power to do were such cases criminal, because the pardoning power rests only in the President. In

Hendryx *vs.* Fitzpatrick, 19 Fed. Rep., 810 (1884), this was pointed out and a large number of authorities cited. The defendant had been committed for contempt, and the question was whether the court had the right to relieve him from the punishment. It was held that it could do so, because the case was remedial and civil and therefore the question of the pardoning power was not involved. In the course of its opinion the Circuit Court for the District of Massachusetts said:—

"The process of contempt has two distinct functions—one criminal, to punish disobedience; the other civil and remedial, to enforce a decree of the court and indemnify private persons."

In the case of

In re Nevitt, 117 Fed. Rep., 448 (1902), Circuit Court of Appeals, Eighth Circuit,

it was prayed, *inter alia*, that proceedings punishing certain judges committed for contempt might be stayed pending an appeal to the President for their pardon. As to this point the court held that the case being civil did not come within the pardoning power, saying:

> "Since that day (Hendryx *vs.* Fitzpatrick, 19 Fed. Rep., 811) there seems to have been no substantial dissent from the rule and practice that an order committing a defendant for contempt in refusing to pay a fine or to obey an order made in a civil suit for the purpose of enforcing the rights and administering the remedies of a party to the action is civil and remedial, and not criminal, in its nature; that it does not fall within the pardoning power of the president, because it is not an execution of the criminal laws of the land, and that it is always within the power and subject to the modification, suspension, or discharge of the court which has made it, and of that court alone, either in the original case or in an appropriate auxiliary proceeding. City of New Orleans *vs.* New York S. S. Co., 20 Wall., 387, 392, 393, 22 L. Ed., 354; Hendryx *vs.* Fitzpatrick (C. C.), 19 Fed., 810; *In re* Debs, 158 U. S., 564, 596, 599, 15 Sup. Ct., 900, 39 L. Ed., 1092. In the last case Mr. Justice Brewer expressing the unanimous opinion of the Supreme Court, said:—
>
> " 'In brief, a court enforcing obedience to its order by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.' "

It will scarcely be contended that in the case at bar or any similar case it is not within the power of the court imposing the punishment to relieve from said punishment when its orders have been obeyed. If this be admitted, the argument of the plaintiffs in error must fail, as it is based upon the fundamental proposition that all judgments in contempt cases are criminal.

The imposition of punishment upon one not a party to

the suit for some misbehavior or disobedience is necessarily vindicatory and final as to him, and even if the punishment is imposed upon a party, if it is plainly done in vindication of the court's authority, for an act already accomplished, it is vindicatory and final; but if the order is made merely to compensate one party for loss inflicted by the other or for the purpose of coercing one into obeying an order of the court made for the benefit of the other, and it is within his power to escape punishment by obeying such order, this is remedial and not reviewable as a criminal case.

The true line of demarcation is suggested to be as indicated in the preceding sentence. Leaving out of account compensatory fines which are not involved here and considering only those cases in which the punishment imposed is a fine payable to the United States or imprisonment, if it is conditional upon the further disobedience of an order made for the benefit of one party to civil litigation, so that by submission to the authority of the court the party convicted will escape punishment, this is a remedial contempt proceeding, and if prior to the termination of the main suit, is interlocutory. In such cases it is the duty of the contumacious party to submit himself to the authority of the court until there has been a final decision in the case, when any errors which may have been made, either in the interlocutory or final orders, may be corrected by writ of error or appeal.

All the cases cited by appellants in error in support of their contention that all contempt cases are reviewable by writ of error were such as were clearly vindicatory and not remedial. In

> Bessette *vs.* W. B. Conkey Co., 194 U. S., 324 (1903),

in which this court decided that the Circuit Court of Appeals for the Seventh Circuit had jurisdiction of a contempt proceeding, the punishment imposed by the lower court was upon one Bessette, who was not a party to the suit. He had violated an order of the court, and to vindicate its authority he was convicted of contempt and fined

$50. The decision was expressly limited to "only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory."

In the

Matter of Christensen Engineering Co., 194 U. S., 458 (1903),

it appeared that the Engineering Company had been found guilty of contempt for disobeying a preliminary injunction. A fine of $100 was imposed for such disobedience, one-half to the United States and one-half to the complainant. The fact that one-half of the fine was payable to the United States as a punishment for an act already done, showed that the contempt proceeding was vindicatory in its nature, and the decision was expressly placed upon this ground. Upon petition for a writ of mandamus to compel the Circuit Court of Appeals to take jurisdiction, Mr. Chief Justice Fuller said:—

> "The distinction between a proceeding in which a fine is imposed by way of compensation to the party injured by the disobedience, and where it is by way of punishment for an act done in contempt of the power and authority of the court, is pointed out in Bessette's case, and disclosed by some of the cases referred to in the opinion. * * *
>
> "These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.
>
> "In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such it dominates the proceeding and fixes its character. Considered in that aspect, the writ of error was justified, and the Circuit Court of Appeals should have taken jurisdiction."

In the case of

Alexander *vs.* United States, 201 U. S., 117 (1905),

the Circuit Court ordered a witness not a party to the suit to answer a question and produce certain books. The imposition of punishment upon a witness for contempt is necessarily final in every case, because, not being a party, he has no further interest in the proceedings. The action of the court as to him is separate and apart from the main suit. In this case Mr. Justice McKenna said:—

> "This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit."

The appeal, however, was taken from the order of the court directing the witness to answer the question, and it was held that it was too soon; even in cases where the proceeding concerns only the witness, there is no finality even as to him until the imposition of punishment.

The case of

Bullock Electric & Mfg. Co. *vs.* Westinghouse Electric & Mfg. Co., 129 Federal Rep., 105 (1904),

was one in which a party to the litigation had been fined $500 for contempt of court in disobeying a preliminary injunction. The decision was not in conflict with the principles heretofore discussed, as it appears from the report that the fine was payable to the United States as a punishment for an accomplished act and neither in compensation for any injury resulting nor to compel performance of any order of the court. Some of the expressions of the opinion are not entirely reconcilable with the position here assumed, but in so far as the *dicta* of the Circuit Judge appear to ignore the distinction between vindicatory and remedial contempt proceedings it is submitted he was in error.

New Orleans *vs.* Steamship Co., 20 Wall. 387 (1874),

was a case which arose under the following circumstances. A military mayor of New Orleans made a lease of certain

water front property to a steamship company. Subsequently, Military Order No. 11 of General Canby forbade such leases to be made. Thereupon the city authorities, another mayor having assumed office, tore down a portion of the improvements which had been erected by the steamship company, and gave notice that they rescinded the lease. The steamship company filed a bill in the Circuit Court of the United States for an injunction to restrain the city authorities from interfering with them, and also for damages for the injury which had been occasioned. The mayor of New Orleans thereupon filed a bill in a District Court of New Orleans asking that the steamship company be enjoined from rebuilding its improvements. Upon motion, the mayor was held to be in contempt of court for having taken such action and was sentenced to pay a fine of $300. Subsequently, the main suit in the Federal Court was finished, an injunction was issued, restraining the city from interfering with the property, and damages were decreed in the sum of $8000. An appeal having been taken from that final decree to the Supreme Court of the United States, it was sought to have the order imposing the fine upon the mayor reviewed and reversed. It was, of course, held that such contempt proceeding was vindicatory and criminal, and for that reason not reviewable by the Supreme Court of the United States. It was said by Mr. Justice Swayne:—

> "That part of the decree is as distinct from the residue as if it was a judgment upon an indictment for perjury in a deposition read at the hearing."

The question involved in the case at bar was not in any way considered.

The case of

In re Chetwood, 165 U. S., 443 (1896),

the only remaining Federal case relating to contempt proceedings cited by the appellants in error, was also a criminal case, in which punishment was imposed upon Chetwood and his counsel for suing out certain

writs of error contrary to the order of the court. The record was brought up by *certiorari* and the action of the lower court was annulled. The case was clearly vindicatory and did not partake in the slightest degree of a remedial contempt. The question at issue in the case at bar as to a right to review contempt proceedings for breach of interlocutory orders was not involved.

It thus appears that the only contempt proceedings reviewable by the Circuit Courts of Appeals on writ of error prior to the termination of the main suit, are such as are vindicatory and therefore criminal.

FIFTH.

Remedial contempt proceedings are a part of the main suit, and can be reviewed on writ of error or appeal only after final judgment in the court below.

Remedial contempt proceedings are held to be a part of the main suit between the parties; the orders of the court sought to be enforced are such as the parties must obey and submit to, whether erroneously made or not, until final disposition of the case, when they may be reviewed upon writ of error or appeal.

In

Hayes *vs.* Fischer, 102 U. S., 121 (1880),

a writ of error was sued out in the Supreme Court to review the action of the Circuit Court of the United States for the Southern District of New York, in imposing a fine upon a party to the action for violation of an injunction. The court did not decide whether the proceedings were remedial or vindicatory, but said, through Mr. Chief Justice Waite:—

> "If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only."
>
> "If the proceeding below, being for contempt

was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *ex parte* Kearney (7 Wheat., 38) and the rule then established was followed as late as New Orleans *vs.* Steamship Company, 20 Wall., 387."

In

Bessette *vs.* W. B. Conkey Co., 194 U. S. 324 (1903),

the distinction between vindicatory and remedial contempt proceedings, which is argued not to exist by plaintiffs in error, was clearly stated by Mr. Justice Brewer. In describing remedial contempts he said:—

"If in the progress of a suit a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. He is the one primarily interested, and if it should turn out on appeal from the final decree in the case that the original order was erroneous, there would in most cases be great propriety in setting aside the punishment which was imposed for disobeying an order to which the adverse party was not entitled."

The only other case of similar nature to the one at bar, which has reached the Supreme Court, is that of

Heinze *vs.* Butte & Boston Consol. Mining Co., 194 U. S., 632 (1904) (Circuit Ct. of Appeals, 129 Fed. Rep., 274).

The facts of this case raised precisely the point now at issue. In the progress of certain litigation in the Circuit Court of the United States for the District of Montana, an order had been made upon Heinze and other defendants requiring them to permit certain representatives of the plaintiff

to survey, examine and inspect certain underground workings and openings of mining claims, the subject matter of the litigation. Having attempted in vain to have said order reviewed on appeal or writ of error Heinze and his associates refused to obey. They were thereupon adjudged to be guilty of contempt. In the judgment of contempt it was provided that the defendants should be committed to prison, but only until such time as they should give the necessary orders and make the necessary provisions for the examination which the court had commanded. In that event, they should also be released from their fines. Circuit Judge Morrow delivered an elaborate opinion, in which he decided that the Circuit Court of Appeals had no jurisdiction because the judgment of the lower court was interlocutory. He found that the contempt proceedings were remedial, being instituted for the purpose of coercing the defendants into the performance of an order made for the benefit of the other party to the litigation. It was further pointed out and especially relied upon that compliance with the order of the court would relieve the defendants from the consequences of their misbehavior. A petition for a writ of *certiorari* to bring the record to the Supreme Court of the United States for review was denied. It appears from an examination of the paper books that the case was elaborately argued and that counsel for petitioners especially contended that the contempt proceedings constituted a criminal case, and for that reason the Circuit Court of Appeals had jurisdiction. If the question was then considered by this court, the case clearly will govern the one at bar. The opinion of Circuit Judge Morrow is very suggestive, and a portion of it is here quoted: —

> "It appears from these decisions that the Supreme Court draws a distinction between a contempt proceeding where the court is called upon to vindicate its authority and dignity and where the enforcement of its order and decrees are, to all intents and purposes, orders in the course of the cause based on the

questions involved as to the legal rights of the parties.

"* * * In the present case the order of the court provided, in substance, that the Butte and Boston Consolidated Mining Company, through its agents and representatives, should be permitted, during a period prescribed in the order, to survey, examine and inspect certain underground workings from the Rarus, Johnstown and Pennsylvania claims, beneath the surface of the Michael Devitt claim, owned by the complainant; and for that purpose such representatives of the complainant were to be permitted to remove or open all doors, bulkheads, or other obstructions which might be found in said premises, obstructing and preventing such examination and survey. The order was for the purpose of enabling the complainant to maintain its legal rights in said premises in the pending suits. The action of the appellants in refusing to comply with this order of the court was a resistance on their part to an adjudicated right in favor of the complainant. But it was provided in the judgment of contempt that the commitment should continue only until they should consent to the inspection, examination and survey of the underground workings specified in the order, and until they should give the necessary orders and provide the necessary means for making such examination, inspection and survey, and should permit the removal of the obstructions provided to be removed in said order, or until the further order of the court. It was further provided that, when the appellants should comply with the order of the court, the order should be discharged as to both fine and imprisonment against each and all of said parties, and none of the parties should be further held or chargeable thereunder. As said by the courts *in re* Nevitt, 117 Fed. Rep., 461; 54 C. C. A., 635:—

" 'They carry the keys of their prison in their own pockets. Governments are founded to administer

justice. Courts are established to determine the rights and remedies of litigants by peaceable decisions under the law, instead of by the wager of battle. They are not infallible, but no better method of determining adverse claims has yet been devised.'

"No constitutional right is denied to the appellants in this case. They are not required to furnish evidence against themselves. They are simply to unbar their doors, stand aside, and allow the representatives of the complainant to ascertain whether in the depths below the surface of their own property the defendant in the suit in which this controversy has arisen is not engaged in extracting and carrying away the wealth of the property. The complainant is simply asking to be allowed to establish and protect its own property and rights, and it would be a miserable failure of justice if the court has not the power to enforce obedience to its orders in such a proceeding." * * *

"The conclusion we reach is that the judgment of contempt of court which the appellants seek to have reviewed upon the present writ of error is a judgment in a civil proceeding; that it is remedial and coercive in its execution, and that it has been entered by the court for the purpose of enforcing the private rights of the complainant judicially determined in its favor; and that the appellants are subject to its terms and conditions. It follows that it is a judgment that cannot be reviewed upon this writ of error, and the writ of error is therefore dismissed, with costs to the defendant in error."

The attention of the court is also invited to the case of

King *vs.* Wooten, 54 Fed. Rep., 612 (4 C. C. A., 519) (1893).

in which it appeared that a sheriff and others had been adjudged to be in contempt for interfering with property in the hands of a Receiver of the Federal Court. It was expressly provided in the order that after payment

of costs, and obedience to the order, the sheriff and his associates should be purged of contempt. The Circuit Court of Appeals dismissed an appeal from this order, it having been taken before final judgment in the court below.

Attention is also called to the case of

In re Nevitt, 117 Fed. Rep., 448 (1902),

in which it appeared that certain county judges had been committed to prison until they should obey a mandamus issued by the Circuit Court of the United States ordering them to levy certain taxes. Obedience to the order would release them from the imprisonment. It was held that the case was not reviewable on *habeas corpus* by the Circuit Court of Appeals. The denial of the writ was placed on the ground that the case could not have been reviewed directly by writ of error, the contempt proceeding being interlocutory, and therefore it could not be indirectly reviewed on *habeas corpus*, as the Circuit Court had jurisdiction of the case and its action was within its legal powers. A portion of the language of the court has already been quoted, it having been incorporated into the opinion of this court in Bessette *vs.* W. B. Conkey Co., *supra*. Further on in its opinion the court said:—

> "The result is that the prayers of the judges of the County Court of St. Clair County must be denied. But they are not remediless. They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets. Governments are founded to administer justice. Courts are established to determine the rights and remedies of litigants by peaceable decisions under the law, instead of by the wager of battle. They are not infallible, but no better method of determining adverse claims has yet been devised. The court whose duty it was to hear and determine this case was left no alternative, under the controlling decisions of the Supreme Court, but to render the judgment and to issue the

mandamus, which these judges are disobeying when the plaintiffs in these judgments prayed for that action, because under the law and under those decisions these plaintiffs had the legal right to that relief. It was the duty of the Circuit Court, and not that of these county judges, to determine whether or not they should levy this tax for the collection of these judgments, and the responsibility for that levy rests upon that court or upon the Supreme Court of the United States, whose decisions rendered its action imperative, and not upon the judges of this county court. Their duty as citizens and officers will be discharged when they comply with the mandate of the Circuit Court. Good citizenship demands the subordination of all our wills and acts to the judgments and orders of the courts which we have established to determine and enforce the rights of all our citizens, even though our private judgment does not always coincide with that of the courts which determine our rights and administer our remedies."

It is therefore submitted that remedial contempt proceedings are not reviewable until after final judgment in the principal case.

All such interlocutory orders and decrees will, however, be reviewed by the Appellate Courts when considering the case after final decree by writ of error or on appeal. In

Worden *vs.* Searles, 121 U. S., 14 (1886),

a preliminary injunction was granted, restraining the infringement of certain patents. The preliminary injunction was disobeyed by one of the parties to the suit, who was adjudged to be in contempt and was fined, not in vindication of the court's authority, but to reimburse the plaintiff for his loss. After final disposition of the case in the court below, it was taken to the Supreme Court by appeal, and there the action of the lower court in granting the preliminary injunction and imposing the fine for disobedience of it was reviewed and

reversed. It was contended that the Supreme Court had no jurisdiction to review these preliminary orders. In reply to this contention, Mr. Justice Blatchford said:—

> "We have jurisdiction to review the final decree in the suit, and all interlocutory decrees and orders."

In

Bessette *vs.* W. B. Conkey Co., 194 U. S., 324 (page 329) (1903),

Mr. Justice Brewer said:

> "If it should turn out on appeal from the final decree in the case that the original (interlocutory) order was erroneous, there would in most cases be great propriety in setting aside the punishment which was imposed for disobeying an order to which the adverse party was not entitled."

SIXTH.

The judgment in the contempt proceedings in the case at bar was remedial and coercive.

It clearly appears, from an examination of the order set forth on page 2 of the certificate, that the contempt proceeding which the plaintiffs in error desire to have reviewed was not vindicatory but remedial and coercive. The defendants were found guilty of contempt for disobeying a previous order found on page 1 of the certificate. There was, however, no final imposition of punishment in vindication of the court's authority; on the contrary, the order was in the alternative; if the defendants should produce the books, as ordered, before a day named, they should suffer no penalty save the payment of costs. If, however, there was a second refusal they were to pay a fine or to suffer imprisonment. This judgment was coercive and remedial; its sole purpose was to compel the plaintiffs in error to perform the order of the court. Not merely by implication but by express

terms, penalties were to be inflicted only in the event of further disobedience. None had been imposed at the time the writ of error was sued out, and none would follow, except in the event of further defiance of the court's authority. The judgment was therefore interlocutory within the meaning of the cases cited, and not reviewable until after the final termination of the main suit.

SEVENTH.

On principle this order should not be reviewable.

Courts exist for the purpose of determining and enforcing the rights of parties litigant in an orderly and legal manner. In order that this may be done, it is necessary for them to have and exercise authority over all persons who appear before them. If, at the conclusion of litigation, an error appears to have been committed this may be corrected by a higher tribunal, but the power to require parties to submit to the court's orders while the case is progressing to a determination is essential to the peaceable settlement of controversies. A different rule would not only give rise to confusion and violence, but would result in a practical denial of justice.

Scarcely less vexatious would be the delay occasioned if it were within the power of a party to the litigation to review by writ of error every interlocutory order made in the progress of a civil suit. It has been held by the Supreme Court of Pennsylvania that a law giving such right of appeal from interlocutory orders is a denial of the constitutional right to speedy justice.

Kurrie *vs.* Cottingham, 209 Pa., 12 (1904).

But if a litigant may refuse to obey interlocutory orders, and upon threat or imposition of punishment to compel obedience, remove the case by writ of error to a higher court he accomplishes the same result.

Vindicatory contempt proceedings are separate and apart from the main suit, and their review by a higher court does not delay or interfere in any way with the progress of the case in the court below. But if contempt

proceedings instituted to compel obedience to an interlocutory order made for the benefit of one of the parties may be reviewed by writ of error, the main suit is necessarily at a standstill until this preliminary question has been determined.

The case at bar is an excellent illustration of the vexatious result of such a rule. (See report of the case in 134 Federal Reporter, 125.) The defendant in error issued certain policies of insurance to the plaintiffs in error insuring them against liability sustained by reason of accidents happening to workmen in their employ. Premiums payable to the insurance company were to be based upon the actual amount of wages paid by the insured to their employees. In order to protect the company in its claim to the premiums, the insured covenanted in their policy that they would exhibit their books for examination by the company at all reasonable times. The company having begun suit for its premiums, contending that the insured had not correctly reported the amount of wages, claimed the right to examine the books according to the contract, which examination necessarily had to be made in advance of trial by an expert accountant. The court having granted the petition, the order having been disobeyed and the contempt proceedings instituted by virtue of such disobedience having been removed to the Circuit Court of Appeals and thence by certificate to this court, it is plainly seen for how long a period of time a suit may be halted, pending the determination of a purely interlocutory and preliminary question, which has to do solely with the method of proof. It is submitted that no such right of review should exist in such case.

But it is argued that it would be a denial of justice not to permit these contempt proceedings to be reviewed, because in the meantime plaintiffs in error are obliged to pay a fine or suffer imprisonment. The answer to this contention is that the plaintiffs in error "carry the keys of their prison in their own pockets." They have but to obey the order of the court, produce their books for examination as ordered and they are relieved

from any penalty. It is their duty, as good citizens, to obey the court's order. "Good citizenship demands the subordination of all our wills and acts to the judgments and orders of the courts which we have established to determine and enforce the rights of all our citizens, even though our private judgment does not always coincide with that of the courts which determine our rights and administer our remedies."

EIGHTH.

The question propounded by the Circuit Court of Appeals should be answered in the negative.

The reasons for the final conclusion may be summarized as follows:—

1. The Circuit Courts of Appeals have jurisdiction to review cases by writ of error only after final judgment.

2. The order disobeyed by the plaintiffs in error was interlocutory.

3. Contempt proceedings for disobedience of interlocutory orders are reviewable in Circuit Courts of Appeals by writ of error only when they are vindicatory or if remedial after final judgment in the principal case.

4. The contempt proceedings in the case at bar were remedial and coercive, and, being part of the main suit, were interlocutory, and are not reviewable until after final judgment in the court below.

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